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MAY 21 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. [redacted] 179

PURE-VAC DAIRY PRODUCTS CORPORATION,
Appellant,

vs.

STATE OF MISSISSIPPI Ex Rel. JOE T. PATTERSON,
Attorney General,
Appellee.

Appeal from the Supreme Court of the State of Mississippi.

STATEMENT AS TO JURISDICTION.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. .....

PURE-VAC DAIRY PRODUCTS CORPORATION,
Appellant,

vs.

STATE OF MISSISSIPPI Ex Rel. JOE T. PATTERSON,
Attorney General,
Appellee.

Appeal from the Supreme Court of the State of Mississippi.

STATEMENT AS TO JURISDICTION.

The Appellant pursuant to United States Supreme Court Rules 13 (2) and 15, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final decree of permanent injunction in question, and should exercise such jurisdiction in this case.

OPINIONS BELOW.

The Supreme Court of the State of Mississippi delivered a written Opinion reversing the judgment of the Chancery Court of the First Judicial District of Hinds County,

Mississippi, and remanded the cause to the Lower Court for the entry of a decree of injunction requiring the Appellant to abide by and perform the requirements of the Mississippi Milk Products Sales Act (Sections 4560.101-124, recompiled Mississippi Code of 1942). Copies of the Opinion of the Lower Court and the Opinion, Final Decree and Judgment of the Supreme Court of the State of Mississippi entered in this action on January 25, 1965 overruling Appellant's Suggestion of Error are attached to this jurisdictional statement and are printed in Appendix A, infra.

JURISDICTION.

The appeal herein is from a Final Decree made and entered by the Supreme Court of the State of Mississippi upon the Appellee's application for a permanent injunction to require the Appellant to abide by and perform the requirements of the Mississippi Milk Products Sales Act (Sections 4560.101-124, recompiled Mississippi Code of 1942).

The Final Decree appealed from was made and entered on January 25, 1965. Notice of Appeal was filed in the Supreme Court of the State of Mississippi on March 8, 1965, and on April 30, 1965 an Order was entered in the Supreme Court of Mississippi extending the time for docketing appeal and filing jurisdictional statement to and including the 21st day of May, 1965.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U. S. C. Section 1257 (2). The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: **Dahnke-Walker Milling Company v. Bondurant,** 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239; and compare **Atchison-Topeka & Santa Fe Railway Company v. Public Utilities Commission of the**

State of California, 74 S. Ct. 92, 346 U. S. 336, 98 L. Ed. 51 and **Bantam Books, Inc. v. Sullivan**, 83 S. Ct. 531, 372 U. S. 58, 9 L. Ed. 2d 254.

STATUTE INVOLVED.

The statute of the State of Mississippi that is involved is the Mississippi Milk Products Sales Act, Sections 4560.-101-124, recompiled Mississippi Code of 1942 and is printed in Appendix B, infra.

The Supreme Court of the State of Mississippi held that the aforementioned statute was constitutional and that the application of the Milk Products Sales Act to the sales made by the Appellant did not interfere with and constitute a burden upon interstate commerce and held that the same act was not in violation of Article I, Section 8 of the Constitution of the United States of America.

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. Does the Mississippi Milk Products Sales Act which (a) requires that manufacturers of milk products selling such products in the State of Mississippi pay a license fee and obtain a license from the Commissioner of Agriculture of the State of Mississippi, (b) requires that manufacturers of milk products pay to said commissioner a fee of one-fourth (¼) cent per gallon on each gallon of milk products sold in the State of Mississippi, (c) requires that manufacturers of milk products file price schedules with said commissioner and sell at the prices shown on the then current price schedule on file with the commissioner, (d) requires that any vendor selling milk products in the State of Mississippi at prices less than those prevailing in the area to be served furnish to said commissioner proof that the prices charged for such products are not below cost, (e) prohibits the sale of milk products within the

State of Mississippi at less than cost, and (f) provides an arbitrary formula in determining "cost" which formula is in part based upon ingredient cost then in effect in the State of Mississippi, constitute an undue burden upon interstate commerce and violate Article I, Section 8 of the Constitution of the United States of America when such act is made applicable to Appellant, which is a non-resident manufacturer of milk products whose entire sales of milk products to residents of the State of Mississippi are sales made in interstate commerce?

2. After Congress has adopted extensive legislation in the form of the Sherman Act, the Clayton Act and the Robinson-Patman Act with a view toward prohibiting unfair competition and trade practices in interstate commerce which would tend to create monopolies or lessen competition, and has created the Federal Trade Commission to enforce such legislation, can the State of Mississippi legislate with respect to the same subject matter by the adoption of the Mississippi Milk Products Sales Act thereby undertaking to regulate Appellee's interstate sales of milk products, when the express and only purpose of such Mississippi Act as stated in the act is to carry out a policy of prohibiting "unfair competition and unfair trade practices" which have the "effect of injuring competitors or destroying or substantially lessening competition?"

STATEMENT OF THE CASE.

The Appellant, Pure-Vac Dairy Products Corporation, is a Tennessee Corporation with its only plant located in Memphis, Tennessee, there are no plants or distribution outlets of any kind in the State of Mississippi. Prior to 1963 the Appellant's mode of operations as to sales of ice cream, ice milk and novelty items in the State of Mississippi was through route salesmen transporting these frozen milk products in route trucks calling on retail

stores at their places of businesses in Mississippi, taking orders and selling these frozen products from the truck. Appellant's route salesmen would supervise the display boxes and would perform other services normally expected of route salesmen. This method of operation was contrary to the usual mode of operation of the Appellant as the established practice of the Appellant was to sell its products at its dock in Memphis, Tennessee, to customers located in several states with the product purchased by the purchaser shipped by truck trailer for the account of and at the risk and expense of the purchaser from the Appellant's Memphis plant to the delivery point designated by the purchaser.

In the latter part of 1962 the Appellant through its officers decided to discontinue the route sales in the State of Mississippi and to follow its usual and customary practice of sales f. o. b. dockside at its Memphis plant to customers in Mississippi with shipment being made in interstate commerce. This proposal was discussed in November and December of 1962 by representatives of the Appellant with representatives of the Appellee, the Commissioner of Agriculture and Commerce of the State of Mississippi and the representatives of the Commissioner's office were fully advised of the proposed method of sales. The representatives of the Commissioner recognized the proposed method of operation as a sale made in Tennessee and constituting interstate commerce. No filing of prices was requested or required of Appellant by the representatives of the Commissioner's office as to this type of operation.

Thereupon, beginning in January, 1963, the Appellant completely changed its mode of operation as to sales to Mississippi customers and discontinued its route sales and deliveries at wholesale prices in Mississippi and followed its usual and customary practice of f. o. b. sales in interstate commerce. Prices thereafter were quoted as f. o. b.

dock, Memphis, Tennessee. The first quoted prices were 80 cents per gallon of ice cream and 60 cents per gallon for ice milk with a specific delivery charge being added according to the distance from the dockside at Memphis, Tennessee, to the point of delivery in the State of Mississippi. The shipment charge was 2 cents per gallon for delivery within a 50 mile radius, 3 cents per gallon for delivery within a 150 mile radius, 4 cents per gallon for delivery within a 300 mile radius. Orders were mailed in or phoned in to the Appellant's office at Memphis, Tennessee. The orders were accepted in Memphis, Tennessee, and the specific order was filled, segregated and loaded separately in refrigeration trucks owned or leased by the Appellant. The specific orders were then unloaded at the dock of the customer's store in Mississippi. The Appellant performed no service in connection with unloading at the customer's dock and the Appellant took no part in the handling of the ice cream and rendered no further services of any kind to the purchaser. Employees of the customer would place these frozen milk products in the storage cooler or in display cases. Bills for these products would be mailed from the office of the Appellant in Memphis, Tennessee, and would be paid by check of the customer mailed to Appellant in Memphis, Tennessee. Most of the shipments in question in these proceedings were part of a through shipment into states other than the State of Mississippi.

On September 11, 1963, the Appellee filed suit against Pure-Vac Dairy Products Corporation and sought from the Chancery Court of Hinds County a prohibitory and mandatory injunction against the Appellant for alleged violations of the Milk Products Sales Act of the State of Mississippi. The suit was not brought to collect taxes from the Appellant but was brought solely for the purpose of having the Court declare that the Appellant was selling perishable fresh milk products within the State of Mississippi and was therefore subject to the supervi-

sion and control of the Commissioner of Agriculture and Commerce of the state. The Appellant filed Answer to the bill of complaint and maintained that the sales were made and consummated in Memphis, Tennessee, and denied that such sales were in violation of the Milk Products Sales Act of Mississippi. It also denied that its sales were subject to the Act. The Appellant also by amended answer contended that the sales were in interstate commerce regulated only by the Congress of the United States and if the Milk Products Sales Act was applied, it interferred with and constituted a burden upon interstate commerce and was therefore in violation of Article I, Section 8 of the Constitution of the United States (Transcript, pp. 60-61). The Chancellor in the lower court proceedings by a full opinion interpreted the basic purposes and provisions of the Milk Products Sales Act and found that the Appellant had not made its sales in the State of Mississippi and that such sales constituted interstate commerce which were not subject to regulation and control by the State of Mississippi under the Milk Products Sales Act. The Chancellor as a part of the opinion rendered in the lower court stated as follows:

> "This Court feels that the contract of sale under the plan of operation of the defendant begun in 1963 was entered into and consummated at Memphis, Tennessee, and not in the State of Mississippi; that, therefore, the defendant was not subject to the provisions of the Milk Products Sales Act of the State of Mississippi. The orders were received at Memphis, Tennessee, at the main plant of the defendant and were accepted by the defendant at Memphis. Therefore, the contract of sale was consummated or executed at Memphis, Tennessee. The specific order was filled and set apart in the special refrigeration truck for each customer. As testified in the depositions of several store owners, they did not care whether de-

livery was made by common carrier or contract carrier and the mode of delivery was left up to the seller to whom specific transportation charges were paid, based on the size of the order and also on the distance from dock side to the customer's store.

'In addition to the fact that the contracts were executed and consummated in Tennessee, all shipments from dock side to customers in Mississippi constituted interstate commerce and if the defendant is forced to sell to retail stores at $1.05 per gallon for ice cream and $.85 per gallon for ice milk rather than $.85 per gallon for ice cream and $.65 per gallon for ice milk as it is now doing because of a more efficient and economical operation, then the consuming public would suffer, the defendant would be penalized and lose business, and such supervision and control would constitute an undue burden on interstate commerce.

This Court, therefore, feels that the bill of complaint praying for both a prohibitory and mandatory injunction against the defendant should be dismissed at Complainant's cost."

The Chancellor after the hearing and in a written opinion, declined to issue the injunction and dismissed the bill. From the decree entered the Commissioner appealed to the Supreme Court of the State of Mississippi. The issue on appeal in the Supreme Court of the State of Mississippi was as stated by the Supreme Court as follows:

"On appeal, the same questions again arise, that is, whether the sales were fully consummated in Memphis, Tennessee, and whether the application of the Milk Products Act constitutes a burden on interstate commerce."

The Opinion of the Supreme Court of the State of Mississippi was filed on December 18, 1964. This Opinion held that the Appellant was engaged in business in the State

of Mississippi and making sales within the State of Mississippi. The Supreme Court of Mississippi further held that the application of the Milk Products Sales Act of Mississippi as applied to the sales by the Appellant was not an undue burden on interstate commerce, therefore the Appellant was subject to all the rules and regulations of the State of Mississippi. The Supreme Court of Mississippi held that the Appellant should be enjoined from continuing its sales to Mississippi customers unless it complied with the Mississippi Milk Products Sales Act.

The Questions Presented Are Substantial.

A. **The Constitutional Question.**

The Supreme Court of Mississippi has held to be constitutional an act which regulates the price which a nonresident vendor must make in its sales in interstate commerce. This is a case of vital importance involving the permissible scope of state regulation of interstate commerce. The decision of the Supreme Court of Mississippi creates a very detrimental burden on interstate commerce. The effect and the result of the Court's construction of the Mississippi Milk Products Sales Act is to exclude the frozen dairy products from a foreign state unless the prices at which the same are sold in interstate commerce comply with the prevailing market price existing in the State of Mississippi.

The Supreme Court of Mississippi has held in its opinion that:

> "It is a proper exercise of the police power of the state, under the Milk Products Sales Act, to regulate the prices at which such products, delivered and sold in Mississippi, may be sold. The sale of the milk products is one consummated in Mississippi and not in Tennessee. In either event however, the regulation

concerns interests which are peculiarly local and does not infringe the national interest in maintaining freedom of commerce across state lines. It is not an unreasonable interference with national interest, but the protection of a legitimate local interest, the prevention of unfair competition and the maintenance of minimum prices for sales made in this state, in this industry vitally effecting the health and public welfare of the state."

The Supreme Court of Mississippi further stated:

"The Commission's purpose is simply to protect primary local interests in relation to the minimum prices of milk sold in this state."

The question is further presented as to the right of the state to regulate interstate sales. The Mississippi Milk Products Sales Act contains no authority whatsoever to regulate the Appellant or any other private carrier **solely** on the basis of transporting milk products. In the absence of the right to regulate sales, the State of Mississippi may not regulate the Appellant's deliveries. The Mississippi Supreme Court has thus held to be constitutional an act which regulates the price of a product sold in interstate commerce.

The application of the Mississippi statute to the Appellant's sales activities solely on the basis of its interstate deliveries would violate the pattern of federal regulation. Under the Interstate Commerce Act, Section 203 (a) (17), 49 Stat. 545, 49 U. S. C., Section 303 (a) (17), 49 U. S. C. A., Section 393 (a) (17), the Appellant makes deliveries of its products to its customers as a "private carrier of property by motor vehicle", which is defined to mean any person not included in the term "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the

owner, lessee or bailee when such transportation is for the furtherance of any commercial enterprise.

The Opinion of the Supreme Court of Mississippi obviously would be different if the method of operation of the Appellant changed to the extent of delivery and transportation by a contract or common carrier.

Upon the facts presented in this record and as developed in these proceedings, the sales made by Appellant to Mississippi customers are uncontroverted sales in interstate commerce.

The Opinion of the Supreme Court of Mississippi is manifestly in error when it holds that the Milk Products Sales Act of Mississippi was enacted as a measure for the protection of the health and welfare of the people of the State of Mississippi. It is apparent from the court's Opinion and the language of the statute itself that the act is not a measure to protect the public welfare and health of the citizens of the State of Mississippi but, on the contrary, it is an act to regulate and fix prices of products which are sold in Mississippi. The extent to which the state will have the right to regulate prices of any and all products of which milk is a component is apparently unlimited if this construction is adopted.

It is the position of the Appellant that the decision of the Supreme Court of Mississippi holding the Mississippi Milk Products Sales Act to be constitutional as applied to the sales of the Appellant in interstate commerce is contrary to all reported cases of the Supreme Court of the United States. It is further the position of the Appellant that to allow the state under the guise of public health and welfare to regulate purely economical benefits to the producers of the state in which the deliveries are made in interstate would unquestionably constitute an undue burden on interstate commerce.

The controlling cases are **Baldwin v. Seelig**, 294 U. S. 511, 79 L. Ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55; **Hood & Sons v. DuMond**, 336 U. S. 525, 93 L. Ed. 865, 69 S. Ct. 657; **Dean Milk Co. v. Madison**, 340 U. S. 349, 95 L. Ed. 329, 71 S. Ct. 295; and **Polar Ice Cream & Creamery Company v. Andrews**, 375 U. S. 361, 11 L. Ed. 2d 389, 84 S. Ct. 378.

In Baldwin, the New York law forbade the sale in New York of milk obtained by a distributor from other states unless the distributor had paid a price which would be lawful under the New York price regulations. This provision was attacked by a New York milk distributor, all of whose milk supply was purchased in Vermont for less than the established New York price. The effect of the New York milk control act was to allow a distributor to import milk or keep it or use it themselves but they could not sell it. The court struck down this provision as an impermissible burden upon interstate commerce. The court likened the effect of this act to custom duties equal to the price differential between New York milk and Vermont milk. In this case the court stated:

> "If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation" . . . "Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result."

The doctrine of **Baldwin v. G. A. F. Seelig, Inc.** received extensive comment in the court's subsequent decision in **H. P. Hood and Sons v. DuMond**, 336 U. S. 525, 69 S. Ct.

657 (1949). While the **Baldwin** case involved an illegal attempt by one state to regulate **imports** and the **Hood** case involved an illegal attempt by another state to regulate **exports**, the Court in the **Hood** case restated the general principle that state attempts to impose economic regulation on interstate commerce are invalid, as follows:

> "[This Court has] recognized broad power in the state to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards even by use of measures which bear adversely upon interstate commerce. But it laid repeated emphasis upon the principle that **the State may not promote its own economic advantages by curtailment or burdening of interstate commerce.**"
>
> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and **its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.**
>
> "**Baldwin v. G. A. F. Seelig, Inc.**, 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A. L. R. 55, is an **explicit, impressive, recent and unanimous condemnation by this court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone.** This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety."
>
> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power

of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in **Baldwin v. G. A. F. Seelig, Inc.**, 294 U. S. 511, 527, 55 S. Ct. 497, 502, 79 L. Ed. 1032, 101 A. L. R. 55, 'What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' In so speaking it but followed the principle that **the state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition.**"

"This Court has . . . recognized this disability of the state to isolate its own economy as a basis for striking down parochial legislative policies designed to do so . . . Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the **free** competition from **every producing area** in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." (Emphasis supplied.)

H. P. Hood & Sons v. DuMond, 336 U. S. 525, 531-539.

The principles as announced in **Polar Ice Cream & Creamery Company v. Andrews**, 375 U. S. 361, 84 S. Ct. 378, 11 L. Ed. 2d 389, are controlling principles to be applied in the case before this Court. The effect and the result of the Mississippi Supreme Court's construction of the Mississippi Milk Products Sales Act is to exclude milk products from a foreign state unless the prices at which the same are sold to Mississippi customers comply with

the prevailing market price. The Supreme Court of the United States in the Polar case very aptly stated:

> "The principles of Baldwin are as sound today as they were when announced. They justify, indeed require, invalidation as a burden on interstate commerce of that part of the Florida regulatory scheme which reserves to its local producers a substantial share of the Florida milk market."
>
> "Florida has no power 'to prohibit the introduction within her territory of milk of wholesome quality acquired (in another State), whether at high prices or at low ones,' 294 U. S. 521, 79 L. Ed. 1037; the State may not, in the sole interest of promoting the economic welfare of its dairy farmers, insulate the Florida milk industry from competition from other states."

It is the position of the Appellant that the State of Mississippi may not regulate interstate commerce solely to protect its own economy. The imposition of economic regulations upon the Appellant directly interferes with interstate commerce. The Chancellor in the Lower Court in his Opinion after hearing all the facts and testimony concluded that the sales in question did occur in Tennessee and that the sales were in interstate commerce. He concluded that it would constitute an undue burden on interstate commerce for the State of Mississippi to regulate such sales and prohibit products from coming into the State due to the fact that they were allegedly sold below a price as established by the Commissioner of Agriculture for the State of Mississippi.

CONCLUSION.

The application of the Mississippi Milk Products Sales Act to the interstate sales and deliveries of the Appellant constitutes an undue burden upon interstate commerce

and violates Article I, Section 8 of the Constitution of the United States.

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257 (2), Title 28, United States Code.

Respectfully submitted,

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APPENDIX A.

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APPENDIX A.

Opinions.

In the
Chancery Court of the First Judicial District
of Hinds County, Mississippi.

No. 64,036.

State of Mississippi, Ex Rel.
Joe T. Patterson, Attorney General,
Complainant,

vs.

Pure Vac Dairy Products Corporation,
Defendant.

Opinion of the Court.

The Complainant, the State of Mississippi, ex rel. Joe T. Patterson, Attorney General, acting for and on behalf of Si Corley, Commissioner of Agriculture and Commerce of Mississippi, has brought suit against Pure Vac Dairy Products Corporation, Defendant, and prays this Court to issue both a prohibitory and mandatory injunction against the Defendant for certain alleged violations of the Milk Products Sales Act of the State of Mississippi, which Act was passed in 1960. The suit is not brought to collect taxes from the Defendant, but is brought solely for the purpose of having the Court declare that the Defendant is selling perishable fresh milk products within the State of Mississippi and is, therefore, subject to the supervision and control of the Commissioner of Agriculture and Commerce of the State.

The Defendant, Pure Vac Dairy Products Corporation, is a Tennessee corporation with its principal plant located

at Memphis, Tennessee; there are no plants or distribution outlets in the State of Mississippi.

Before 1963, Pure Vac's mode of operation as to sales of ice cream, ice milk, and novelty items, was through route salesmen transporting these frozen milk products in route trucks and calling on retail stores at their places of business in Mississippi, taking orders and selling these frozen milk products from the truck. Pure Vac's route salesmen would service the display boxes and would perform other services normally expected of route salesmen.

Beginning in 1963, Pure Vac completely changed its mode of operation as to sales. Prices were quoted as f. o. b. dock, Memphis, Tennessee. The first quoted prices were 80¢ per gallon for ice cream and 60¢ per gallon for ice milk, with a specific delivery charge being added according to the distance from the dockside at Memphis, Tennessee. The shipment charge was 2¢ per gallon for delivery within a 50-mile radius, 3¢ per gallon within a 150-mile radius, and 4¢ per gallon for delivery within a 300-mile radius. Orders were mailed in or phoned in to the Defendant's office in Memphis, Tennessee. Sometimes these orders were called in collect and the Defendant paid the telephone charges. The orders were accepted in Memphis, Tennessee, and the specific order was filled, segregated, and loaded separately in special refrigeration trucks owned or leased by the Defendant. These specific orders were then unloaded at the dock of the customer's store. Employees of the customer would place these frozen milk products in a storage cooler or in display cases. Bills for these products would be mailed from the office of the Defendant in Memphis, Tennessee, and would be paid by check of the customer mailed to the Defendant in Memphis.

The Complainant's contention is that this constituted doing business and making sales within the State of Mis-

sissippi and that, therefore, the Defendant is subject to all the provisions of the Milk Products Sales Act, specifically the provision that ice cream and ice milk could not be sold at less than the price list posted with the Commissioner of Agriculture and Commerce of the State of Mississippi, unless the Defendant proved to the Commissioner that these perishable fresh milk products were not being sold below cost with the intent or with the effect of injuring competitors, or destroying or substantially lessening competition.

With its more efficient and economical operation, the Defendant was selling ice cream and ice milk at 20¢ per gallon less than the prices prevailing in Mississippi.

Section 4560-102 of the Mississippi Code of 1942, as amended, sets forth the legislative policy with reference to the Milk Products Sales Act as follows:

> "The policy of the state is to promote the general welfare through the prohibition of unfair competition and unfair trade practices or sale within the State of Mississippi by any person of perishable fresh milk products below cost with the intent or with the effect of injuring competitors or destroying or substantially lessening competition . . . ."

The policy, therefore, is to protect not only the dairy industry of Mississippi but especially to protect the consuming public with reference to sales made in or within the State of Mississippi.

This Court feels that the contract of sale, under the plan of operation of the Defendant begun in 1963, was entered into and consummated at Memphis, Tennessee, and not in the State of Mississippi; that, therefore, the Defendant was not subject to the provisions of the Milk Products Sales Act of the State of Mississippi. The orders were received at Memphis, Tennessee, at the main plant

of the Defendant and were accepted by the Defendant at Memphis. Therefore, the contract of sale was consummated or executed at Memphis, Tennessee. The specific order was filled and set apart in the special refrigeration truck for each customer. As testified in the depositions of several store owners, they did not care whether delivery was made by common carrier or contract carrier, and the mode of delivery was left up to the seller, to whom specific transportation charges were paid based on the size of the order and also on the distance from dockside to the customer's store.

In addition to the fact that the contracts were executed and consummated in Tennessee, all shipments from dockside to customers in Mississippi constituted interstate commerce, and if the Defendant is forced to sell to retail stores at $1.05 per gallon for ice cream and 85¢ per gallon for ice milk, rather than 85¢ per gallon for ice cream and 65¢ per gallon for ice milk as it is now doing because of a more efficient and economical operation, then the consuming public would suffer, the Defendant would be penalized and lose business, and such supervision and control would constitute an undue burden on interstate commerce.

This Court, therefore, feels that the Bill of Complaint praying for both a prohibitory and mandatory injunction against the Defendant should be dismissed at Complainant's cost.

Stokes V. Robertson, Jr.,
Chancellor.

1/30/64

In the Supreme Court of Mississippi

No. 43,228.

State of Mississippi, ex rel. Joe T. Patterson, Attorney General,

vs.

Pure Vac Dairy Products Corporation.

Lee, Chief Justice:

The State of Mississippi ex rel. Joe T. Patterson, Attorney General, acting for and on behalf of Si Corley, Commissioner of Agriculture and Commerce of the State of Mississippi, filed a bill of complaint against Pure Vac Dairy Products Corporation, organized and existing under the laws of Tennessee, but doing business in Mississippi.

The allegations of the bill set out the origin and continuance of this controversy as follows: Commencing in 1960 it was charged that the defendant, with a license to operate as a manufacturer and distributor of perishable milk products, began to ignore some of the statutory provisions relating to this matter. However, in 1961, after an alleged violation of Section 4560-108 (c) Mississippi Code Annotated (Supp. 1962), the defendant agreed, under the provision of Section 4560-118 (b) of said Code, to pay the costs and desist from any threatened violation. But the defendant, from January 1963, has continued to violate said provisions by selling such products in certain counties of the State at less than the established price therefor. In July 1963, the defendant filed with the Commissioner a revised schedule, listing prices of ice cream, ten percent butter fat, at $.85 per gallon, and ice milk at $.65 per gallon, to which would be added a small freight charge. Since those prices were below the prevailing prices in the affected areas, the Commission notified the defendant

to comply with Section 4560-108 (b) Mississippi Code Annotated (Supp. 1962), by furnishing the proof therein required. The defendant refused to do so. It also refused to comply with the provisions of Section 4560-113 of the above stated Code, in failing to report the quantity of such perishable milk products, and notified the Commissioner, on August 8, 1963, that no such reports would thereafter be forthcoming. The defendant, in addition, refused to pay the fees and assessments prescribed, in violation of Section 4560-111 of the above stated Code.

The prayer of the bill was for the issuance of a writ, enjoining the defendant against violations of Sections 4560-111, 4560-113, 4560-108 (c), Mississippi Code Annotated (Supp. 1962), and against refusal to comply with Section 4560-108 (b) thereof by furnishing proof that its prices were not below costs, to be verified by the Commissioner.

The answer of the defendant substantially admitted the statement of facts, set out in the bill of complaint, but denied the effect and conclusions, allegedly made by the pleader in reaching the results as charged. It maintained that the sales, which it has made, were made and consummated in Memphis, Tennessee, and denied that such sales were in violation of the Milk Products Sales Act of Mississippi. It also denied that it has threatened to continue the alleged violations, and denied that its sales were subject to the Act. It pled that sales, since January 3, 1963, were contracts f.o.b. its docks in Memphis, Tennessee; that title was passed to the purchaser at that time; and that possession of the defendant became that of agent or bailee for the purchaser. It amended its answer to the effect that, if mistaken in the sufficiency of the foregoing defense, then, alternatively, the sales were in interstate commerce, regulated only by the Congress of the United States; and, if the Milk Products Sales Act is applied, it interferes with and constitutes a burden upon interstate

commerce and is in violation of Article 1, section 8, Constitution of the United States.

The evidence showed that Pure Vac Dairy Products Corporation is a Tennessee corporation, with its only plant located in Memphis, Tennessee. It has no plants in Mississippi. Prior to 1963, its mode of operation in the sale of ice cream, ice milk and novelty items, in Mississippi, was through route salesmen, transporting the products in trucks and calling on retail stores, taking orders, and selling the products from the trucks. These salesmen would also look over the stocks in the stores and make recommendations as to quantities of various items to be purchased. In other words, this mode of doing business was a pure peddling operation.

In 1963, the corporation discontinued that kind of operation, and adopted, what it denominates as its f.o.b. dock, Memphis, Tennessee, prices. Under that practice, its prices were listed at $.80 per gallon for ice cream and $.60 per gallon for ice milk, with special charges added for delivery. In a 50 mile radius, this charge was $.02 per gallon; in 150 miles, $.03; and in 300 miles, $.04. (The total cost to the purchaser was approximately $.20 a gallon less than the established prices in Mississippi.) Orders could be made by mail or by telephone, even collect. It was claimed that the orders were accepted in Memphis, Tennessee, the specific order filled and loaded separately in refrigerated trucks, owned or rented by the corporation, and driven by employees of the corporation from its dock to the dock of the customer's store, where the goods were unloaded by the customer. But the corporation was neither a common nor contract carrier. It had no permit from either the Public Service Commission of Mississippi or the Interstate Commerce Commission. The ordered products were under the control of the corporation from its docks to the customer's dock. The driver took his orders from his manager, the Secretary-Treasurer of the corporation,

who could stop his truck on the route, if it could be located, and divert it wherever such officer desired. The corporation was acting in a dual capacity, both as manufacturer and as hauler, but it said that title passed at the dock at Memphis and the products were delivered from Pure Vac, the manufacturer, to Pure Vac, as hauler. It appeared that Pure Vac was to bear the loss for damage in transit, but it must have done so as distributor because it replaced the goods, and did not pay for the damage in money. The defense said that it was an economic advantage to make the deliveries at particular times and haul only merchandise which had been previously ordered. The Commissioner has, in no way, tried to change the corporation's method of doing business.

The learned chancellor, after a hearing, in a written opinion, declined to issue the injunction, and dismissed the bill. From the decree entered, the Commissioner appealed.

On appeal, the same questions again arise, that is, whether the sales were fully consummated in Memphis, Tennessee, and whether the application of The Milk Products Act constitutes a burden on interstate commerce.

By Mississippi Laws 1960, chapter 155, section 4560-141, et seq., Mississippi Code Annotated (Supp. 1962), the Legislature invoked the police powers of the state in the creation of the Mississippi Milk Commission. The title of the chapter was designated as "An Act to create a commission designated as the Mississippi Milk Commission to supervise and regulate the production, transportation, storage, distribution, and sale of fluid milk and to regulate the dairy industry; to provide for the licensing of producer distributors, dealers or handlers, and retail stores dealing in fluid milk; to regulate and fix minimum prices for fluid milk at the producer level, and minimum and maximum prices at the wholesale and retail levels; to

provide for the raising of funds for the administration of this act and defraying the cost and expenses thereof; to impose penalties for the violation of the act and rules and regulations lawfully issued thereunder; * * * and for other purposes."

Mississippi Laws 1960, chapter 155, section 15; Mississippi Code Annotated, section 4560-155 (a) through (l) (Supp. 1962), contains a detailed method of designating marketing areas, and fixing prices for milk, upon public hearings and evidence, in which all persons in interest, the general public, and any persons whatsoever could testify.

After such hearings, the Commission can fix the prices of milk, in its various forms, both in the original condition after obtained from the cow and through the various stages to, and including, its ultimate grades and states of development. The orders of the Commission, issued thereon, are presumed to be correct; but appeals are allowed as a matter of right. By Mississippi Code Annotated section 4560-157 (Supp. 1962), the Commission was authorized to make, promulgate, and enforce reasonable rules, covering fair trade practices.

The constitutionality of this Act was upheld in the case of Mississippi Milk Commission v. Vance, 240 Miss. 814, 129 So. 2d 642 (1961).

The Milk Products Sales Act, chapter 156, Laws 1960, sections 4560-101, et seq., Mississippi Code Annotated (Supp. 1962), bore the following title: "An Act to assure a full supply of fresh milk products at competitive prices and to prevent unfair competition and unfair trade practices in the sale of perishable fresh milk products; to prevent the sale of perishable fresh milk products below cost; to prevent discrimination in prices and services which injure competitors or destroy or substantially lessen competition; to provide remedies and impose penalties for violations of this

Act; to provide for the raising of funds for the administration and enforcement thereof and to repeal chapter 134, Laws of 1956, and chapter 137, Laws of 1958, the same being the Unfair Milk Sales Act, as amended; and for other purposes."

Section 2 of said chapter, section 4560-102, Mississippi Code annotated (Supp. 1962) provides as follows: "STATEMENT OF LEGISLATIVE POLICY. It is hereby declared to be the legislative intent to encourage fair and honest competition and to safeguard the public against unfair, unjust disruptive, demoralizing, and fraudulent business practices existing in transactions involving the sale of, offer to sell, or inducement to sell perishable fresh milk products in the wholesale and retail trades in this state. The policy of the state is to promote the general welfare through the prohibition of unfair competition and unfair trade practices or sale within the State of Mississippi by any person of perishable fresh milk products below cost with the intent or with the effect of injuring competitors or destroying or substantially lessening competition, the purpose of this act being to carry out that policy in the public interest."

Section 4 of the above chapter, section 4560-104 Mississippi Code Annotated (Supp. 1962), provides as follows: "UNFAIR TRADE PRACTICES AND SALE BELOW COST UNLAWFUL. It shall be unlawful for any person with intent or with the effect of injuring competitors, or destroying or substantially lessening competition to engage in unfair trade practices or to offer for sale, advertise for sale, or sell within the State of Mississippi, either at wholesale or retail, fresh milk products at less than the cost of same as provided herein to the person manufacturing or selling same, provided that such offer for sale, advertisement for sale, or sale may be made for the purpose of meeting a competitive price at which same may be offered for sale, advertised for sale, or sold by a competitor within any trade territory wherein said competi-

tive price may be used by a competitor. The advertising for sale of perishable fresh milk products below cost except to meet a competitive price substantiated as provided herein shall be prima facie evidence of an unfair trade practice."

Section 4560-106, Mississippi Code Annotated (Supp. 1962), gives the method in detail for the determination of the basic cost of milk.

Section 4560-107 of said Code denominates thirteen different trade practices as unfair.

Section 4560-108 (a) of said Code requires the manufacturer or distributor to file with the commission, on forms to be furnished by the Commissioner, the current wholesale price for perishable milk products, etc., to be sold by it. Subsection (b) thereof is the provision for the change or withdrawal of the above mentioned price schedule until notice, as required, is furnished to the commissioner. If the price is below those prevailing in the area, he must then furnish proof that the prices are not below his cost of production.

Necessarily, the time and place of the sale of property must be determined by the intention of the parties. 2 Williston, Sales, section 261 (1948). Section 263, *Ibid.*, at pages 12-13, cites section 19 of the Uniform Sales Act and sets out certain rules for ascertaining the intention of the parties. For instance, it says in part: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: * * *

"Rule 5:—If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

"This rule states the doctrine of the common law." 2 Williston, Sales, section 279a, at page 87.

Of course, if the shipments were made by common or contract carrier, the placing of the same in the hands of such a carrier, f. o. b. its equipment at Memphis, would constitute delivery to such carrier as agent for the consignee. Powell v. Aldridge, 202 Miss. 648, 32 So. 2d 146 (1947), and the many authorities there cited. See also Southern Creosoting Co. v. Whitfield, 130 Miss. 476, 94 So. 452 (1922). The statement of facts, heretofore given, shows that the perishable products, manufactured by, and in the hands of, Pure Vac were delivered to neither a contract nor a public carrier; that they were transported in trucks, over which Pure Vac exercised control, and which were operated by Pure Vac employees; and that they were delivered in that manner to the dock of the purchaser. Besides, two of the customers of Pure Vac testified that, if there was damage in transit, Pure Vac did not pay for the damage in money, but simply replaced the damaged merchandise. This fiction of duality is an insufficient basis on which to declare that possession was delivered in Tennessee. The delivery was actually effected in Mississippi as the products were carried to the customers' docks for them to receive. There seems to be no substantial difference, in fact between the peddling operation, first employed by Pure Vac, and the one which has now supplanted it. Consequently, the appellee should conform to the provisions of the Act.

It is a proper exercise of the police power of the state, under the Milk Products Sales Act, to regulate the prices at which such products, delivered and sold in Mississippi, may be sold. The sale of the milk products is one consummated in Mississippi and not in Tennessee. In either event, however, the regulation concerns interests which are peculiarly local, and does not infringe the national interest in maintaining freedom of commerce across state lines. It

is not an unreasonable interference with national interests, but the protection of a legitimate local interest, the prevention of unfair competition, and the maintenance of minimum prices for sales made in this state, in this industry vitally affecting the health and public welfare of the state.

The leading article on this subject, which has affected many subsequent Supreme Court decisions, is by Noel T. Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1 (1940). Under current doctrine, the validity of a state law depends upon a balancing of the national and local interests affected, and upon the nature and extent of the burden, if any, which the law imposes on interstate commerce. See South Carolina State Highway Department v. Barnwell Brothers, 303 U. S. 177, 58 S. Ct. 510, 82 L. Ed. 734 (1938); and California v. Zook, 336 U. S. 725, 69 S. Ct. 841, 93 L. Ed. 1005 (1949). See also Stern, The Scope of the Phrase Interstate Commerce, 41 A. B. A. J. 823, 871 (1955).

The record reflects a genuine local need for regulation of minimum prices in a local industry. It is not sound policy to deny the state power to protect itself from unregulated competition, particularly under the "balancing" standard, in sales completed in this state, with the seller delivering the product to retailers in Mississippi.

The case of Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A. L. R. 55 (1935), appears not to be controlling in the present case. It held invalid that part of the New York Milk Control Act which prohibited the sale in New York of milk produced and bought outside the state at a price lower than the minimum for similar purchases within the state. The appellant there purchased milk from Vermont producers at less than the permissible minimum in New York. The court held, in effect, that New York could not regulate the prices paid producers out of the state. The commission,

in the present instance, does not propose to do that, but only to regulate the price charged for milk products sold in Mississippi. The same deficiencies condemned in the Seelig case existed in Polar Ice Cream & Creamery Co. v. Andrews, 375 U. S. 361, 84 S. Ct. 378, 11 L. Ed. 2d 389 (1964). There Florida sought to require a Florida milk processor to allocate its milk purchases for four classes of milk among Florida producers, although the Polar Company had purchased in the past seventy percent of its milk from out-of-state producers. The court followed the principles of the Baldwin case. But the Polar case is likewise distinguishable, because there Florida was seeking to exclude foreign milk from a major portion of the Florida market.

Mississippi, in the present instance, is not seeking to do anything of that nature. The commission's purpose is simply to protect primary local interests in relation to the minimum prices of milk sold in this state. No discrimination is effectuated against Pure Vac, because it has the same right as Mississippi producers to sell in the Mississippi market, subject to minimum prices, unless Pure Vac can show that it can produce and sell at a lesser price than Mississippi producers, and still operate at not less than cost. The burden is on Pure Vac to establish the latter fact.

The decision in Milk Control Board, etc. v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752 (1939), applied the doctrine which governs this case. Pennsylvania's regulations for license, bond, and price were held valid in their application to a New York dealer, operating in Pennsylvania, and purchasing milk in that state for delivery to New York.

In County Board of Arlington County, Va. v. State Milk Commission, 346 U. S. 937, 98 L. Ed. 423 (1954), the Supreme Court of the United States in a per curiam decision, cited the Eisenberg case, supra, as authority for so

doing. While the facts were not stated therein, presumably there must have been considerable factual similarity in both cases. This Court is therefore of the belief that the United States Supreme Court at this time, continues to apply the Eisenberg principle and would uphold the present state regulations.

As heretofore stated, there was no substantial issue on the facts. The questions arose simply for a construction of those facts, and the application of the law to them. Thus the trial court and this Court stand on an equal footing in determining the application of the law to the factual situation. It is the opinion of this Court, for the reasons stated, that the learned chancellor misconstrued the effect of the principles of the law, which govern this case; and that the temporary injunction, as prayed for in the bill of complaint, should have been granted. It therefore follows that the decree of the trial court must be, and it is, reversed, and the cause is remanded to that court for further proceedings, consistent with the views herein expressed.

Reversed and Remanded.

All Justices Concur.

Friday, December 18, 1964, Court Sitting.

State of Mississippi ex rel., Joe T. Patterson,
Attorney General,

vs. 43,228.

Pure Vac Dairy Products Corporation.

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge and decree that the decree of said Chancery Court

rendered in this cause on the 6th day of February, 1964, be and the same is hereby reversed and the cause is remanded to the trial court for further proceedings consistent with the views expressed this day in the written opinion in this cause. It is further ordered and adjudged that the appellant do have and recover of and from the appellee all of the costs of this appeal to be taxed, for which let proper process issue.

Minute Book "BN", page 252.

Monday, January 25th, 1965, Court Sitting.

State of Mississippi ex rel., Joe T. Patterson, Attorney General,

43,228. vs.

Pure Vac Dairy Products Corporation.

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

Minute Book "BN", page 268.

APPENDIX B.

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APPENDIX B.

Milk Products Sales Act, Sections 4560-101 to 124, Recompiled Mississippi Code of 1942.

§ 4560-101. Milk Products Sales Act—short title.

This act shall be known and may be cited as "The Milk Products Sales Act."

§ 4560-102. Statement of Legislative Policy.

It is hereby declared to be the legislative intent to encourage fair and honest competition and to safeguard the public against unfair, unjust, disruptive, demoralizing, and fraudulent business practices existing in transactions involving the sale of, offer to sell, or inducement to sell perishable fresh milk products in the wholesale and retail trades in this state. The policy of the state is to promote the general welfare through the prohibition of unfair competition and unfair trade practices or sale within the State of Mississippi by any person of perishable fresh milk products below cost with the intent or with the effect of injuring competitors or destroying or substantially lessening competition, the purpose of this act being to carry out that policy in the public interest.

§ 4560-103. Definitions.

The following words, terms, and phrases, when used in this act, shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) "Persons" shall mean and include any individual, firm, association, company, partnership, limited partnership, corporation, joint stock company, agency, syndicate, receiver, trustee, fiduciary, trade association, farm bureau federation, co-operative association, or co-operative

marketing association whether organized under the agricultural adjustment law of this state or otherwise and producer-distributor of perishable fresh milk products. The term shall not include persons who produce raw milk and sell same to processors or manufacturers.

(b) "Perishable fresh milk products" shall mean and include ice cream, fruit ice cream, nut ice cream, variegated ice cream, frozen custard, imitation ice cream, ice milk, milk sherbert, water ice, frosted malted milk, malt base or milk shake base, sandwiches made with frozen desserts, ice cream or any other frozen dairy products, frozen confection, mix from which any frozen dessert is made, and any other frozen dairy food or frozen dessert and mix therefor as defined in the laws of Mississippi, and cottage cheese. The term shall not include condensed milk, evaporated milk, cheese, butter or milk powder.

(c) "Commissioner" shall mean the Commissioner of Agriculture and Commerce of the State of Mississippi.

(d) "Manufacturer" means any person engaged in the business of processing, manufacturing and/or packaging and selling of perishable fresh milk products as defined herein.

(e) "Distributor" means any person who sells or delivers on consignment or otherwise any perishable fresh milk products to consumers or retailers in the same containers as those in which he purchases or acquires them from manufacturers.

(f) "Retailer" means any person who owns, operates, or manages a grocery store, hotel, restaurant, soda fountain, or any similar establishment which sells or distributes perishable fresh milk products as defined herein.

(g) "Consumer" means any person who purchases perishable fresh milk products solely for personal use or the use of his household.

(h) "Licensee" means any person who holds the license required by this act.

§ 4560-104. Unfair trade practices and sale below cost unlawful.

It shall be unlawful for any person with intent or with the effect of injuring competitors, or destroying or substantially lessening competition to engage in unfair trade practices or to offer for sale, advertise for sale, or sell within the State of Mississippi either at wholesale or retail, fresh milk products at less than the cost of same as provided herein to the person manufacturing or selling same, provided that such offer for sale, advertisement for sale, or sale may be made for the purpose of meeting a competitive price at which same may be offered for sale, advertised for sale, or sold by a competitor within any trade territory wherein said competitive price may be used by a competitor. The advertising for sale of perishable fresh milk products below cost except to meet a competitive price substantiated as provided herein shall be prima facie evidence of an unfair trade practice.

§ 4560-105. Discrimination in prices between localities in the state.

It shall be unlawful for any person with the intent or with the effect of unfairly diverting trade from a competitor or otherwise injuring a competitor or of destroying or substantially lessening competition to discriminate in prices in the sale of any perishable fresh milk products between any of the cities, towns, or counties of this state, provided that no violation will result from different prices which reflect the actual transportation cost from the point of processing or purchase to the point of resale and provided further, that prices made to meet competition in such city, town, or county shall not be in violation of this section. Proof of advertisement, giving, offering for sale, or sale of any such products in any one of such cities,

towns, or counties at prices less than advertised, given, offered for sale, or sold in any other such city, town, or county by such person which cannot be accounted for by the difference in such transportation cost or which cannot be accounted for as necessary to meet competition shall be prima facie evidence of violation of this section.

§ 4560-106. Cost.

(a) The cost below which perishable fresh milk products shall not be offered for sale, advertised for sale or sold by any person at wholesale or retail with intent or with the effect of injuring competitors or destroying or substantially lessening competition, shall be the basic cost as provided herein of raw or recombined milk which is processed, plus any added ingredients, or the basic cost as provided herein of the butterfat and milk solids not fat, and other ingredients of the perishable fresh milk products, plus, in either case, the cost of doing business by the person selling same at wholesale or retail as evidenced by the standards and methods of accounting regularly employed by him, which cost of doing business shall be allocated proportionately to each unit of the products sold as it pertains to the specific item sold, and must include, without limitation, labor costs (including salaries of executives and officers); costs of receiving, cooling, processing, manufacturing and storing the products sold; rent, depreciation, selling cost, maintenance of plant and equipment, delivery costs, all types of licenses, taxes, insurance, advertising, and all other costs of doing business. The unit cost for perishable fresh milk products as computed hereunder shall be based on average cost for the person selling same at wholesale or retail during the previous twelve (12) months, except that the cost of raw products shall not be less than the cost as hereinafter provided. In the event that the person selling such perishable fresh milk products at wholesale or retail has been in business less than twelve (12) months, his cost shall be presumed

to be not less than the lowest price for his trade area as evidenced by prices on file with the commissioner as hereinafter provided. In the absence of proof by a retailer of his actual cost of doing business as provided herein, his cost of doing business shall be presumed to be ten per cent (10%) of the invoice cost paid by such retailer for perishable fresh milk products, when such products are displayed in cabinets owned and serviced by the manufacturer, wholesaler, or distributor of such perishable fresh milk products, and shall be presumed to be fifteen per cent (15%) of the invoice cost of perishable fresh milk products, when the retailer owns and services either the display cabinets or the instore storage for maintaining such perishable fresh milk products and the cost below which such retailer shall not offer for sale, advertise for sale or sell said perishable fresh milk products, shall be calculated by adding to said invoice cost, the applicable ten per cent (10%) or fifteen per cent (15%) thereof, and such price shall be calculated to the nearest one-half (½) cent on each sales unit.

(b) The cost of the butterfat and milk solids not fat, used in determining the cost of perishable fresh milk products shall at no time be less, for butterfat, than the current price announced by the United States Department of Agriculture for ninety-two (92) score butter, plus twenty-five per cent (25%) of such announced price, and for milk solids not fat, the current price announced by the United States Department of Agriculture, which announced prices shall be the same as those used by the market administrators of any federal milk orders in effect in Mississippi in determining prices under such orders.

§ 4560-107. Unfair trade practices.

(a) The following trade practices are hereby declared to be unfair trade practices and it shall be unlawful for any manufacturer, or distributor, to engage in such trade

practices with the intent or with the effect of injuring competitors or destroying or substantially lessening competition:

(1) To discriminate in price between retailers or between consumers who purchase any of the perishable fresh milk products where such products are offered for sale in the same size and type of container, provided that charging a higher price to consumers for perishable fresh milk products delivered to the home of consumers than the price charged for the same when not so delivered shall not constitute discrimination.

(2) To give or offer any discount or rebate on perishable fresh milk products sold, provided that a discount not to exceed five per cent (5%) of the applicable list price of the manufacturer, or distributor of perishable fresh milk products may be allowed to a retailer when such perishable fresh milk products are displayed and/or stored in refrigeration equipment owned by the retailer.

(3) To furnish, give, lend, sell, or rent any signs and display material except those advertising only his own products to any retailer. Such signs and display material shall not contain the name or products of such retailer. All signs installed and/or rental agreements on advertisements in place as of the effective date of this act shall be considered in compliance with this regulation, provided that such signs or installations shall not be moved to a new or different location for the purpose of advertising the name or products of such retailer.

(4) To make payments of money, credit, gifts (including products) or loans to retailers or their employees or for rental for the storage or display of perishable fresh milk products.

(5) To sell any retailer any new fixture or equipment for less than the cost to the seller plus a mark-up to cover

the seller's cost of handling the fixture or equipment which shall be deemed in the absence of specific proof to be ten per cent (10%). Any used fixture or equipment sold to a retailer by a manufacturer, or distributor shall be sold on the basis of the manufacturer's or distributor's cost, less depreciation, plus a mark-up to cover the manufacturer's or distributor's cost of handling the fixture or equipment which shall be deemed in the absence of specific proof to be ten per cent of their depreciated book value, provided that in no case shall used fixture or equipment be transferred to a retailer at less than a reasonable value of the fixture or equipment at the time of sale and in no case shall such transfer be at less than twenty-five per cent (25%) of the original purchase price of such fixture or equipment.

(6) To make any loan or to guarantee or to procure another to guarantee or to underwrite, any financial obligation of a retailer.

(7) To extend credit to a retailer for an unreasonable period of time, or to use credit as a devise or subterfuge to give rebates or discounts.

(8) To maintain or make repairs of any equipment owned by a retailer, at less than charges comparable to competitive commercial fees including service and parts.

(9) To make any gift of money, merchandise, soda fountain, carbonator, services, material, property, fixtures, or equipment of any value to any retailer, to assist him in the conduct of his business.

(10) To sell or offer to sell any perishable fresh milk products at dock prices to persons other than distributors or to distributors at places other than the point of processing, manufacturing, or packaging, except that at a company owned branch such dock prices shall be the dock price at the point of processing, manufacturing or packag-

ing plus any transportation cost to the company owned branch.

(11) To supply a retailer with any dispensers, or any other refrigeration or storage facilities except those used exclusively for the storage, preservation and display of the perishable fresh milk products manufactured or distributed by such manufacturer, or distributor.

(12) To combine perishable fresh milk products with some other commodity for sale at a price less than the lawful minimum price of the perishable fresh milk products and the normal retail value of the other commodity.

(13) To give any premiums which require submission by the purchaser of any part of the perishable fresh milk products container, a facsimile thereof or any other proof of purchase.

(b) The following trade practices are hereby declared to be unfair trade practices and it shall be unlawful for any retailer to engage in such trade practices with intent or with the effect of injuring competitor or destroying or substantially lessening competition:

(1) To combine perishable fresh milk products with some other commodity for sale at a price less than the lawful minimum price of the perishable milk products and the normal retail value of the other commodity.

(2) To give trading stamps in excess of the number given in normal trade or premiums as a device to sell perishable fresh milk products below cost as defined herein.

(3) To give any premiums which require submission by the purchaser of any part of the perishable fresh milk products container, a facsimile thereof or any other proof of purchase.

§ 4560-108. Price schedule to be furnished.

(a) Each manufacturer, or distributor shall file with the commissioner on forms prescribed and furnished by him a dated schedule of current wholesale prices for perishable fresh milk products offered for sale at wholesale to distributors or by either of them at wholesale to retailers or to any other person for sale at wholesale to a retailer and each of them shall also file in the same manner a dated schedule of current retail prices for the perishable fresh milk products offered for sale at retail to consumers. Each manufacturer or distributor selling perishable fresh milk products to a distributor or to a retailer shall furnish to each distributor or retailer the current price schedule for the perishable fresh milk products sold and shall supply the distributor or retailer with all subsequent applicable price schedules. Price schedules required by this section shall be furnished to the commissioner and to each distributor and retailer within fifteen (15) days after the effective date of this act.

(b) Price schedule for perishable fresh milk products can be superseded, changed or withdrawn only on forms prescribed and furnished by the commissioner and by filing a copy thereof, with the commissioner before the new schedule becomes effective and until that time, the old schedule shall continue in force. Any person filing a price schedule which contains prices which are below those prevailing in the area to be served shall furnish proof that prices shown are not below cost for the perishable fresh milk products sold by such person. The information furnished to show that such prices are not below cost shall be subject to verification by the commissioner. Any sale of perishable fresh milk products at a price less than the price for the same as shown on the price schedule on file with the commissioner for the person making such sale shall be prima facie evidence of an unfair trade practice.

(c) All sales at wholesale or retail of perishable fresh milk products by the manufacturer or distributor shall be

in accordance with the current filed schedules, and all sales by a retailer shall be based on current filed schedules plus his actual cost of doing business or ten per cent (10%), whichever is less. It shall be unlawful for any manufacturer or distributor or for any retailer to make a sale at less than his cost, based on the current filed price schedule unless the sale was in fact made in good faith to meet a competitive price of a competitor. The burden of proving such good faith sale to meet a competitive price shall be upon both the seller and the retailer in such sale. The manufacturer or distributor making such sale and the retailer receiving the benefit of the lower price in such sale shall each make a separate written report to the commissioner within five (5) calendar days from the date of such sale. Such written report shall include the name and address of the customer or competitor as applicable, the competitive price met, and the effective date of such price and such other pertinent information as to assist the commissioner in determining whether such sale was in fact made in good faith to meet a competitive price. Provided however, that when such price change is made only by the retailer, the manufacturer, or distributor shall not be required to make such report to the commissioner. Failure to file a written report within the time specified shall be prima facie evidence of an unfair trade practice in violation of this statute.

§ 4560-109. Commissioner of Agriculture and Commerce to administer and enforce.

(a) The Commissioner of Agriculture and Commerce of the State of Mississippi is hereby authorized, empowered and directed to administer and enforce this act. He may prescribe, adopt and enforce rules and regulations as may be necessary to administer and carry out the stated intent of this act. He may delegate to one or more persons employed by the Department of Agriculture and

Commerce of the State of Mississippi the authority to do and perform any and all of the functions required to be done and performed by the commissioner under this act.

(b) The commissioner is authorized to employ and fix the salaries of such agents, auditors, stenographers and other personnel, to purchase such equipment, automobiles, supplies or other things, and to pay salaries and all other or further expenses, including but not limited to, the expenses of conducting investigations, attorney's fees as provided herein, and such other investigations, inquiry and collection of information as may be necessary in the administration and enforcement of this act.

§ 4560-110. Entry and inspection and investigation.

(a) The commissioner or any person employed by the commissioner in the administration and enforcement of this act shall have access to and may enter at all reasonable hours all places in the state where perishable fresh milk products are produced, stored, packaged, processed, manufactured, bought, sold, or handled or where books, papers, records, documents or memoranda relating to such transactions are kept and shall be empowered to inspect, photograph, photostat, mark or stamp for identification, audit, and copy same and to obtain such information and testimony for the purpose of ascertaining facts which the commissioner deems necessary for the administration and enforcement of this act.

(b) When in the judgment of the commissioner an audit, examination, or inspection of the books, papers, records, documents or memoranda relating to processing, manufacturing, selling or handling of perishable fresh milk products of a manufacturer or distributor doing business, both within and without the state and maintaining his principal place of business outside the state, such audit, examination, or inspection may be made at

the principal place of business outside the state to the same extent and same effect as audits, examinations, or inspections made of books, papers, records, documents or memoranda located in this state. The commissioner may elect to audit, examine, or inspect all books, papers, records, documents and memoranda as referred to herein at the principal place of business of the manufacturer or distributor rather than require the manufacturer or distributor to transport such books, papers, records, documents, or memoranda to some place in this state. When the commissioner so elects to audit, examine, or inspect the books, papers, records, documents, or memoranda of the manufacturer or distributor at his principal place of business, he may charge the cost thereof to include only the actual and direct expense involved, to be determined after the audit, examination, or inspection has been made, to the manufacturer or distributor and such manufacturer or distributor shall pay such cost to the commissioner. When billing such manufacturer or distributor with the cost of such audit, examination, or inspection, the commissioner shall furnish an itemized statement of the expenses and cost of such audit, examination, or inspection to the manufacturer or distributor. The amount when paid by the manufacturer or distributor shall be deposited by the commissioner into the special fund created by this act.

§ 4560-111. Fees.

In order to obtain funds for the administration and enforcement of this act, the commissioner is authorized and empowered to assess and collect fees from every person subject to this act provided that no fees shall be assessed and collected from any person for the sale of perishable fresh milk products at retail at a retail store conducted at a fixed place of business. Except as provided in the preceding sentence, every person manufacturing, distributing or selling perishable fresh milk products shall pay

to the commissioner a fee of one-fourth (¼) cent on each gallon of perishable fresh milk products sold by him in this state at wholesale or at retail.

Such fees shall be maximum fees and the commissioner shall fix the fees to be assessed and collected hereunder in an amount not to exceed the maximum to produce sufficient funds for the proper and effective administration and enforcement of this act. The commissioner shall reduce the fees assessed hereunder when funds on hand and unobligated exceed one hundred ten per cent (110%) of the operating budget for one year. When the fees provided for by this act have been assessed and collected upon the sale of perishable fresh milk products at wholesale, no fees shall be assessed and collected upon the sale of the same product at retail.

§ 4560-112. Special fund for expenses of administration and enforcement.

The amount of the fees so assessed and collected and all license fees, penalties, costs, or attorney's fees collected by the commissioner as hereinafter provided shall be paid into the state treasury and set aside by the state treasurer in a separate fund to be known as the "Milk Products Sales Act Account," which is hereby created as a revolving fund to be used by the commissioner to defray the cost of administering and enforcing this act and for no other purpose. All payments made by the commissioner pursuant to this act shall be paid from said account by warrants drawn by the commissioner on the state treasurer. All fees, penalties, and costs as herein provided shall be personal debts of the person liable to pay them and the commissioner shall have the right of action in a court of competent jurisdiction to sue for and recover fees, penalties, and costs owing and unpaid.

§ 4560-113. Reports and records required.

(a) Each person subject to pay fees to the commissioner under this act shall report to the commissioner, on forms prescribed by him, the quantity of perishable fresh milk products processed, distributed, manufactured, or sold by him in this state and shall pay to the commissioner the fees assessed thereon as provided herein. Such reports and payments shall be postmarked on or before the twenty-fifth (25th) day of each month following the month in which such products were processed, distributed, or manufactured or sold within the state. Each person required to file such reports shall pay a penalty for each report postmarked after the date provided herein, based on one dollar ($1.00) for the first day and two dollars ($2.00) for each succeeding day until such report shall have been filed. The date of the postmark shall be adequate proof of a late report for purposes of assessing the penalty provided herein. The assessment of such penalty shall not limit the authority of the commissioner to revoke any license issued pursuant to this act. Such reports and the books and records of every person subject to this act shall be subject to audit and verification by the commissioner and he shall have authority to assess and collect the correct amount of fee and/or penalty owing by any person subject to this act and to refund any erroneous overpayment to the person making same.

(b) Each manufacturer or distributor shall keep such sufficient books and records which will enable the commissioner to determine the unit cost for perishable fresh milk products. All sales at wholesale shall be recorded on a sales ticket or invoice made in duplicate, which sales ticket or invoice shall show the items sold and the price charged. One copy of the sales ticket or invoice shall be supplied to the buyer at the time such sale or delivery is made and one copy shall be retained by the manufacturer or distributor. Each manufacturer, distributor, or retailer

shall keep such sales tickets or invoices on file for at least one year unless authorized by the commissioner to destroy such tickets or invoices.

§ 4560-114. License required.

Every manufacturer, distributor or retailer before engaging in the business of manufacturing, distributing or selling perishable fresh milk products in Mississippi shall first obtain a license from the commissioner for each plant or place of business where he carries on any such business. Applications for such license shall be made on forms prescribed and furnished by the commissioner and a fee of one dollar ($1.00) shall be paid to the commissioner with each application submitted to him. Licenses issued hereunder by the commissioner shall expire on the thirty-first (31st) day of March in each year and applications for renewals thereof shall be made annually, prior to said expiration date.

§ 4560-115. Granting, refusing and revoking licenses.

(a) The commissioner shall refuse to issue a license to any person who is in default of any report or payment of any fees or penalties due hereunder or who has failed to file any price schedule required by this act, and shall have the power to revoke any license issued by him under this act whenever it is determined by him that the person holding such license is in default of any report or payment of any fees or penalties due hereunder or has failed to file any price schedule required hereunder. In event of such default, the commissioner shall mail by registered or certified mail to the person in default written notice thereof, which notice shall inform said person that his license will be revoked unless all reports and payments or price schedules due to be made or filed by him are received by the commissioner within ten (10) days after the date of said notice. In the event the commissioner should

not receive such reports and payments or price schedules within the time specified, he shall have the power to revoke the license of the person in default, such revocation becoming effective upon the mailing by the commissioner by registered or certified mail of notice of revocation to the person in default. Notices required to be mailed to any person shall be mailed to him at his usual postoffice address, or in the case of a nonresident person, either to him at his usual post-office address or to his resident agent for service of process at the post-office address of the resident agent designated in the appointment of such resident agent. Any person whose license has been refused or revoked shall not thereafter engage in the business for which the license was applied for or issued until such time as the provisions of this act have been complied with and a license issued by the commissioner.

(b) Notwithstanding any other remedies provided hereunder, the commissioner may revoke any license issued hereunder for violation of any of the provisions of this act. Provided, however, that before the commissioner shall revoke any license for any violation of any provision of this act, except as provided in paragraph (a) of this section, he shall hold a hearing on at least ten (10) days' notice, at which time, the licensee shall have the right to appear in person or by counsel and introduce evidence to be heard on the matter under consideration. The commissioner shall direct to such licensee by registered of certified mail, sent to his last known address, a notice of hearing and a statement of the matters to be considered. Direction of such notice by registered or certified mail as herein provided shall be sufficient notice of hearing notwithstanding any refusal of the addressee to accept or to receive said notice.

The commissioner shall cause a stenographic record to be made of the hearing as herein provided and shall make a written finding of fact, based on the information ob-

tained at such hearing and may, if the record contains adequate evidence of violation, revoke the license issued hereunder. Any person whose license has been revoked for violation of one of the provisions of this statute may appeal to the Chancery Court of the First Judicial District of Hinds County, Mississippi and the court shall hear and determine on the case as an appellate court and shall affirm or reverse the revocation. Appeals from the decree of said chancery court shall be allowed to the commissioner and other parties as in other cases.

§ 4560-116. Penalty for operating without license.

Any person required by this act to obtain a license from the commissioner before engaging in any business referred to in this act who shall engage in such business without having first obtained such license, or shall engage in such business after such license shall have expired or shall have been revoked by the commissioner shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than fifty dollars ($50.00) and not more than five hundred dollars ($500.00). Each day's violation shall constitute a separate offense.

§ 4560-117. Resident agent appointment.

Any nonresident person applying to the commissioner for a license to engage in the business of processing, distributing, manufacturing or selling perishable fresh milk products in this state shall file in the office of the Secretary of State of Mississippi a written power of attorney designating the secretary of state as the agent of such nonresident person upon whom service of process may be had in the event of any suit against said nonresident person, and such power of attorney shall be so prepared and in such form as to render effective the jurisdiction of the courts of Mississippi over such nonresident person and make such person amenable to the jurisdiction of the courts of this

state; provided, however, that any such nonresident who has designated or shall hereafter designate a resident agent in Mississippi upon whom process may be served as provided by law generally, or limited to service of process arising under this act shall not be required so to designate the secretary of state as such agent. The secretary of state shall be allowed such fees therefor as provided by law for filing designations of resident agents. The commissioner shall be furnished with a copy of the designation of the secretary of state or other person or corporation as agent for service of process, such copy to be duly certified by the secretary of state. No license shall be issued by the commissioner to any nonresident person who has not so designated the secretary of state or some other agent as resident agent for the service of process and had a certified copy of such designation filed in the office of the commissioner.

§ 4560-118. Procedure in event of violation.

(a) Any person injured or damaged by any violation of this act or who would suffer injury or damage from any threatened violation of this act may complain to the commissioner of such violation or threatened violation hereof by one or more persons. The commissioner shall forthwith investigate such complaint to determine whether there has been or is at the time of the investigation a violation or threatened violation of this act. The commissioner may, also, on his own initiative without having received a complaint make investigations to determine whether there has been, or is at the time of the investigation, a violation or threatened violation of this act by one or more persons.

(b) When the commissioner has determined after investigation that there has been or is a violation or threatened violation of this act, he shall give the defendant opportunity to sign an agreement to pay the costs of investiga-

tion not to exceed five hundred dollars ($500.00) and to cease and desist from such violation or threatened violation. If the defendant signs such agreement, the commissioner shall take no further action so long as the defendant conforms to said agreement and continues to cease and desist from any violation or threatened violation of the act and pays the costs of investigation as agreed.

(c) If the defendant shall fail or refuse to execute a written agreement, as aforesaid, to cease and desist from any violation or threatened violation of this act or in event defendant has executed such written agreement and it shall appear to the commissioner that the defendant fails to cease and desist from violation or threatened violation of this act, or in event the commissioner has determined that defendant has been in violation or threatened violation of the act and had terminated such violation or threatened violation after the complaint was made or investigation was begun but has resumed violation or threatened violation of this act, the commissioner shall forthwith certify the record of his investigation, and the bill of costs taxed against the defendant to the Attorney General of the State of Mississippi and the attorney general shall institute in the name of the State of Mississippi an injunction suit in any county in which the alleged violation was committed or is threatened to be committed or in which the defendant resides or has his principal place of business, in order to restrain the defendant from any violation or threatened violation of this act. The commissioner of agriculture is hereby authorized and empowered, with the advice and consent of the attorney general, to employ any licensed attorney of the State of Mississippi as a special assistant attorney general to prosecute any injunction suit, and the compensation of such attorney so employed shall be fixed by the attorney general and, when certified by him to the commissioner as having been earned, shall be paid by the commissioner.

(d) Any person damaged by any violation of this act or any threatened violation of this act may intervene in the injunction suit as a complainant and may propound in such suit any claim for any damages which he may have sustained by virtue of any violation or threatened violation of this act by the defendant. If in such action a violation or threatened violation of this act shall be established, the could shall enjoin or restrain and otherwise prohibit such violation or threatened violation, shall tax against the defendant the cost of suit and the costs of the investigation by the commissioner and when the attorney general has employed an assistant attorney general for the purpose of bringing suit, the court shall determine the amount of a reasonable attorney's fee to be recovered by the State of Mississippi, and shall also tax same against the defendant. When the costs of investigation of an attorney's fee shall be recovered in such suit and shall be paid, the amounts so paid shall be covered into the state treasury and become a part of the Milk Products Sales Act Account created by this act. If in such action, any person intervening as complainant shall recover damages because of a violation or threatened violation of this act, such person shall be entitled to recover from the defendant damages triple in amount of any actual damages found by the court to have been sustained as a result of the defendant's violation or threatened violation of this act.

§ 4560-119. Injunction an additional remedy.

The rights and remedies herein provided are in addition to those otherwise provided by law. Any person damaged by a violation or a threatened violation of this act may sue for an injunction, for damages or for other relief without first having made a complaint to the commissioner. Any person may be enjoined by a court of competent jurisdiction from the violation or threatened violation of any of the provisions of this act. Any person found by any court in

any action to be in violation or threatened violation of any of the provisions of this act shall be liable for triple the actual damages, if any found by the court to have been sustained by any plaintiff or complainant as a result of such violation or threatened violation, and recovery shall be awarded accordingly.

§ 4560-120. Application of provisions.

Notwithstanding the provisions of sections 1090, 4486, and 4519, Mississippi Code of 1942, this act shall apply to all persons as defined in section 3 (a) [§ 4560-103] hereof.

§ 4560-121. Exceptions.

The provisions of this act shall not apply in the following cases:

(1) In the closing out of a manufacturer's or distributor's stock, fixtures, and equipment for the purpose of discontinuing business as a manufacturer or distributor.

(2) When the perishable fresh milk products or fixtures and equipment are being sold by an officer acting under the orders of any court.

§ 4560-122. Severability of provisions.

Should any part of this act be adjudged invalid or unconstitutional, such adjudication shall affect only the part of this act specifically covered thereby and shall not affect any other provisions or parts of this act.

§ 4560-123. Unfair Milk Sales Act repealed.

Chapter 134, laws of 1956, and chapter 137, laws of 1958,* the same being the Unfair Milk Sales Act [§§ 4560-52–

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* Editor's Note—

Chapter 137, Laws of 1958, amended former §§ 4560-52, 4560-56, 4560-59, 4560-60. Provisions as to licenses and fees are set forth in former § 4560-59, the text of which is retained in this Supplement, supra.

4560-62], as amended, are hereby repealed but this repeal shall not affect or defeat any assessment, claim, suit, appeal, right, or cause of action due or begun thereunder prior to the effective date of this act or shall thereafter be begun and the law hereby repealed is expressly continued in full force, effect and operation for the purpose of enforcing any obligations arising under such law prior to the effective date of this act. The commissioner shall not issue any license as provided by this act to any person licensed under said chapter 137, laws of 1958, until such person has filed all reports and paid all fees required by said chapter 137, laws of 1958. All fees collected by the commissioner under the provisions of chapter 137, laws of 1958, and remaining in the "Dairy Industry Unfair Trade Practices Account" created by said chapter 137, laws of 1958, on the effective date of this act shall be transferred by the commissioner to the "Milk Product Sales Act Account" created herein. All fees collected by the commisisoner from licensees under the said chapter 137, laws of 1958, after the effective date of this act shall be deposited by him in the said "Milk Products Sales Act Account." The commissioner shall then pay from the "Milk Products Sales Act Account" any and all obligations which accrued under provisions of said chapter 137, laws of 1958.

§ 4560-124. Effective date.

This act shall take effect and be in force from and after its passage (approved May 11, 1960).

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FILED
JUN 10 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 179

PURE-VAC DAIRY PRODUCTS CORPORATION,
Appellant,

vs.

STATE OF MISSISSIPPI Ex Rel. JOE T. PATTERSON,
ATTORNEY GENERAL,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. .....

PURE-VAC DAIRY PRODUCTS CORPORATION,
Appellant,

VS.

STATE OF MISSISSIPPI Ex Rel. JOE T. PATTERSON,
ATTORNEY GENERAL,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

MOTION TO DISMISS

Appellee in the above styled case moves to dismiss this appeal on the grounds that the decision below is clearly correct and that no substantial federal question is presented.

STATEMENT OF THE CASE

This suit was instituted in the Chancery Court of the First Judicial District of Hinds County, Mississippi, by the duly elected and acting Attorney General of the State of Mississippi, for and on behalf of the duly elected and acting Commissioner of Agriculture and Commerce of the State

of Mississippi pursuant to Section 4560-118(c), Mississippi Code Annotated Recompiled (1942), as amended, in order to enjoin the Appellant from certain violations of The Milk Products Sales Act of the State of Mississippi, being Sections 4560-101 through 4560-124, inclusive, Mississippi Code Annotated Recompiled (1942), as amended, a copy of said Act being set forth in Appendix B of Appellant's Jurisdictional Statement.

The Milk Products Sales Act is basically a law designed to prohibit the sale of perishable fresh milk products at less than cost. Perishable fresh milk products consist of ice cream, ice milk and other frozen dairy products, as distinguished from fluid milk products regulated under the Milk Commission Act of Mississippi. The statute also prescribes certain unfair trade practices as being unlawful, which supplements the basic provisions of the Act by prohibiting certain activities which would tend to circumvent the basic provision prohibiting sales below cost. The law prescribes a system for filing price schedules with the Commissioner and makes it unlawful for a licensee to sell milk products at a price below the price schedule so filed. If a licensee files a revised price schedule containing prices which are below those prevailing in the market, the statute prescribes a certain procedure whereby said licensee must submit proof that the revised prices are not below cost, which proof shall be subject to verification by the Commissioner. It was the refusal of Appellant to comply with this latter part in regard to the furnishing of proof and permitting same to be verified by the Commissioner that necessitated the filing of this suit in the Court below. The statute also requires the filing of certain reports and the payments of certain assessments upon milk products sold within the State of Mississippi, and it is the refusal of Appellant to file such reports and pay such assessments

that also necessitated the filing of this suit in the Court below.

The Appellant is a corporation duly organized and existing under the laws of the State of Tennessee, but has been authorized and qualified to do business in the State of Mississippi, said Appellant having appointed a resident agent for service of process. The Appellant is engaged in the business of selling milk products to retailers located within the State of Mississippi, said Appellant having been issued a license by the Commissioner to operate in the State of Mississippi as a "Manufacturer" and "Distributor" of milk products. Pursuant to the provisions of Section 4560-108(a), Mississippi Code Annotated Recompiled (1942), as amended, the Appellant did file with the Commissioner a price schedule for milk products offered for sale at wholesale to retailers, said price schedule becoming effective on June 9, 1960. Said price schedule stated that ice cream, 10 per cent butterfat, would be sold for $1.05 per gallon and that ice milk would be sold for $.89 per gallon.

On various dates from February 6, 1961, through December 18, 1961, the Appellant did violate the provisions of Section 4560-108(c), Mississippi Code Annotated Recompiled (1942), as amended, by selling milk products to retailers in the State of Mississippi at prices lower than those set forth in said price schedule, and the Appellant did on June 6, 1962, agree to pay the cost of investigation and executed a written cease and desist agreement whereby the Appellant agreed to thereafter cease and desist from any violation or threatened violation of The Milk Products Sales Act.

Sometime during the months of November or December, 1962, the Commissioner was advised by officials of the Appellant that they would no longer sell any milk

products within the State of Mississippi and that thereafter the Appellant would make all sales at f.o.b. Appellant's dock in Memphis, Tennessee, at prices of $.80 per gallon for ice cream and $.60 per gallon for ice milk, which prices were later increased to $.85 and $.65 respectively because of an increase in sugar prices, with the cost of transportation from the dock in Memphis to the location of the retailer being paid for by said retailer. However, subsequent investigation disclosed that all of said transactions were simply a scheme or device to evade the laws of the State of Mississippi, and that the sales were being made at delivered wholesale prices in the State of Mississippi.

Since the revised price schedule contained prices which were below those prevailing in the area to be served, the Commissioner, acting pursuant to the authority contained in Section 4560-108(b), Mississippi Code Annotated Recompiled (1942), as amended, notified the Appellant that it would be necessary for Appellant to furnish proof that said prices were not below cost, which would be subject to verification by the Commissioner. The Appellant has failed and refused to comply with said statutory requirement.

Because of the foregoing reasons, the Appellee did on September 11, 1963, file its Bill of Complaint in the Chancery Court of the First Judicial District of Hinds County, Mississippi, and requested that said Court enter its decree enjoining the Appellant from any further violations of The Milk Products Sales Act. On the 6th day of February, 1964, the Chancery Court entered its Final Decree dismissing the Bill of Complaint with prejudice.

The case was then appealed to the Supreme Court of the State of Mississippi, where the only issues in controversy were as follows:

(1) Whether or not the Appellant has been selling milk products within the State of Mississippi in order that the jurisdiction of the State may be applied thereto.

(2) Whether or not the enforcement of The Milk Products Sales Act as to these transactions would constitute an undue burden on interstate commerce.

On December 18, 1964, the Supreme Court rendered its opinion holding in favor of the Appellee on both issues, said opinion being set forth in Appendix A of Appellant's Jurisdictional Statement, and reported in 170 So.2d 274. A Suggestion of Error was overruled on January 25, 1965, and Judgment rendered on the same date. As to the question of interstate commerce, the Mississippi Supreme Court held as follows:

> In either event, however, the regulation concerns interests which are peculiarly local, and does not infringe the national interest in maintaining freedom of commerce across state lines. It is not an unreasonable interference with national interests, but the protection of a legitimate local interest, the prevention of unfair competition, and the maintenance of minimum prices for sales made in this state, in this industry vitally affecting the health and public welfare of the state.

The Milk Products Sales Act does not guarantee or insure any manufacturer of any certain return on his investment, but said Act is basically a prohibition against sales below cost. If a manufacturer is more efficient and economical in his operation than his competitors, resulting in a lower cost, then said manufacturer can sell at prices lower than his competitors, and the savings brought about by economy and efficiency can then be passed on to the consuming public. The Act is designed to promote rather than curtail legitimate competition. A manufacturer who

sells at less than his own cost would do so, not for profit, but for the sole purpose of destroying his competitors with limited capital who are unable to operate for very long at a loss. After the competition is destroyed, the manufacturer with the most capital will then control the market and have the consumer at his mercy. As it has been said before, "A price war does not determine who is right, but who is left."

ARGUMENT

1. The Mississippi Supreme Court Was Correct in Holding That the Sales Were Made in the State of Mississippi, Thereby Placing Them under the Jurisdiction of The Milk Products Sales Act of the State of Mississippi.

A distinction should be made between sales made at "delivered wholesale prices" and those made at "dock prices". Sales made at delivered wholesale prices are those in which the manufacturer uses his own trucks driven by his own employees in delivering milk products to a *retailer*. Sales made at dock prices are those which are made to persons other than retailers, such as *distributors* or other *manufacturers*, who actually receive the product at the manufacturer's dock in their own truck, or in some cases shipped by contract carrier, and said distributor or other manufacturer then resells the product to retailers at delivered wholesale prices.

In this case, the Appellant has incorporated some of the features of a dock price system, at least the form thereof, in order to devise a scheme to evade the Laws of Mississippi and other states which, unlike Tennessee, have effective fair trade laws prohibiting sales below cost. It should be noted that this is not a case where a distributor

uses his own truck and driver to pick up the milk product at the Appellant's dock in Memphis, Tennessee, nor is it a case where a common or contract carrier is used for this purpose, said common and contract carriers being the only legitimate occasion to use the letters "f.o.b." in the first place. The Appellant has, as to form, adopted a paper transaction for a system normally used in delivering products from a manufacturer to a distributor, whereas in substance and in reality the delivery system is the same as customarily used in transactions between a manufacturer and a retailer. The milk product is delivered in trucks owned or leased by the Appellant and driven by the Appellant's employees, and the product is under the complete control of the Appellant from Memphis to the premises of the stores in the State of Mississippi, which is no different from any other sale made at a delivered wholesale price. There is no actual, open, manifest, visible, or continuous change of possession until the product is received at the premises of the stores in Mississippi, since prior tc that time the product is continuously in the possession and under the control of the Appellant, being transported in trucks and vehicles owned or leased by the Appellant and driven by employees of the Appellant.

The Appellant is attempting to operate in a dual capacity, both as Pure-Vac, the manufacturer, and Pure-Vac, the hauler, and is now contending that title passes in Memphis, Tennessee, when Pure-Vac, the manufacturer, delivers to Pure-Vac, the hauler. The Mississippi Supreme Court was correct in stating as follows:

> This fiction of duality is an insufficient basis on which to declare that possession was delivered in Tennessee. 170 So.2d, at page 278.

The foregoing facts alone are sufficient to justify the decision of the Mississippi Supreme Court; however, there

are certain additional undisputed facts in this case which clearly show beyond doubt that this is simply a scheme or device to evade the Laws of Mississippi, which facts are as follows:

(1) The retailers in Mississippi were first contacted by travelling representatives of the Appellant who were seeking to induce said retailers to purchase milk products from the Appellant, the solicitations by said representatives of Appellant occurring within the territorial limits of the State of Mississippi.

(2) It was the understanding of the retailers in Mississippi that the Appellant was to bear the loss on all products damaged while in route from Memphis to the store in Mississippi, and that they would not accept any products so damaged while in transit.

(3) Although the evidence shows that the retailers would transmit their order by mail or telephone to Appellant's office in Memphis, Tennessee, it should be noted that the telephone calls were paid by the Appellant and that on some occasions the telephone calls were originated by the Appellant in calling to see if the retailer desired to place an order when a truck was coming in his vicinity.

(4) The retailer was to pay a specified transportation charge of $.02, $.03, or $.04 per gallon according to the price schedule filed with the Commissioner, but the record shows without dispute that no transportation charge was made or paid by the retailer for the various novelty items purchased from the Appellant.

(5) The record also shows by the depositions taken in this case that it is the understanding of the retailers that title does not pass until the milk product is either received at the store or paid for by the retailer, both of which occur in the State of Mississippi.

Appellant admitted that it was within the power of Pure-Vac to shift the f.o.b. point anywhere along the route. To permit any parties to a transaction, under the guise of the private law of sales, to convert an otherwise local transaction to one in interstate commerce would completely destroy and disrupt the entire regulatory system throughout the United States and would completely break down well-established relationships existing among the several states as to their respective responsibilities. What possible interest could the State of Tennessee have in the various transactions involved in this litigation since said transactions do not in any way affect the competitive conditions existing in that state, but on the other hand, these same transactions are of vital and utmost concern to the State of Mississippi. To pass title, there must be a delivery whereby Pure-Vac surrenders possession to either the buyer or a third party (contract or common carrier) on behalf of the buyer. Regardless of the fact that the particular order is set aside and identified at the Memphis plant, Pure-Vac does not divest itself of possession and control until it arrives in Mississippi.

Therefore, the Mississippi Supreme Court was correct in holding that the sales of milk products by the Appellant in this case are made within the State of Mississippi under the law of sales.

Even if Appellant had satisfied the technicalities of the private law of sales, he could not prevail in this case, because it is not within the power of the parties by the form of their contract to convert what was exclusively a local transaction, subject to state control, into an interstate commerce transaction protected by the commerce clause. *Superior Oil Company* v. *Mississippi*, 280 U.S. 390, 50 S. Ct. 169, 74 L. Ed. 504, *Browning* v. *Waycross*, 223 U.S. 16, 34 S. Ct. 578, 58 L. Ed. 828.

2. The Application of The Milk Products Sales Act of Mississippi to the Transactions of the Appellant in This Case Does Not Constitute an Undue Burden on Interstate Commerce.

First, Appellee will discuss four decisions of the U. S. Supreme Court which are frequently cited by opponents of state milk regulatory laws, which cases are also being relied upon by opposing counsel in their Jurisdictional Statement.

In the case of *Baldwin* v. *Seelig,* 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935), a dealer in Vermont purchased bulk milk from producers in Vermont. The dealer in turn sold the milk in bulk to a handler in New York, it being admitted that title passed at the dealer's plant in Vermont. The handler then bottled the milk in New York and sold to stores in New York. New York was attempting to regulate a transaction wholly occurring within the State of Vermont, and the action of the state was obviously discriminatory and directed toward the exclusion of outside milk. Therefore, the Baldwin case has no application to the case at bar.

In the case of *Hood* v. *DuMond,* 336 U.S. 525, 69 S. Ct. 657, 93 L. Ed. 865 (1949), a handler located in Massachusetts made application with the Commissioner in New York to build a receiving station in New York, at which milk would be purchased from producers located in New York. The handler already had several receiving stations in New York, and the license was denied on the grounds that the area was already being adequately served by local milk. In this case, the action of New York specifically discriminated against an out-of-state handler in favor of local handlers and producers, and was for no other purpose than to actually exclude the operations of said handler from the State of New York. The application of The Milk Prod-

ucts Sales Act of Mississippi is not discriminatory against the Appellant or any out-of-state handler and does not in any way exclude the out-of-state handlers from selling in Mississippi.

In the case of *Dean Milk Company* v. *City of Madison*, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951), a handler located in Illinois was attempting to sell milk to stores located in the City of Madison, Wisconsin. The city adopted an ordinance prohibiting the sale of milk in the city unless it had been pasteurized and bottled at an approved plant located within five (5) miles of the center of the city. The United States Supreme Court struck down the ordinance and stated as follows:

> . . . We also assume since Congress has not spoken to the contrary, the subject matter of the ordinance lies within the sphere of state regulation even though interstate commerce may be affected. Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939); see Baldwin v. Seelig, Inc., 294 U.S. 511, 524 (1935).
>
> But this regulation, like the provision invalidated in Baldwin v. Seelig, Inc., supra, in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. "The importer . . . may keep his milk or drink it, but sell it he may not". Id., at 521. In thus erecting an economic barrier protecting a major local dairy against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. . . .

The above case is clearly distinguishable from the case at bar since the city ordinance clearly discriminated against

interstate commerce and was directed toward exclusion rather than equality of competition.

In the case of *Polar Ice Cream & Creamery Co.* v. *Andrews,* 375 U.S. 361, 84 S. Ct. 378, 11 L. Ed. 2d 389 (1964), the Florida Milk Commission adopted a regulatory scheme which required local handlers to accept out of state milk only if local producers were unable to fill the handlers' needs, which, again, was a case of obvious discrimination directed toward exclusion, entirely different from the case at bar.

Having now discussed the above cases, Appellee will refer to several of the U. S. Supreme Court's decisions announcing the law which does apply to the case at bar. In the case of *Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. 346, 59 S. Ct. 528, 83 L. Ed. 752 (1939), a handler with a receiving station in Pennsylvania was purchasing milk from producers located in Pennsylvania. The handler with a processing plant in New York would then sell milk to stores located in New York. This case questioned the authority of Pennsylvania to control the producer price, and in upholding the state's authority to do so, this Court stated:

> . . . But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce.

> The purpose of the statute under review obviously is to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania. Its provision with respect to license, bond, and regulation of prices to be paid to producers are appropriate means to the ends in view. The question is whether the prescription of prices to be paid producers in the effort to accomplish these ends constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment. That question can be answered only by weighing the nature of the respondent activities, and the propriety of local regulation of them, as disclosed by the record.
>
> These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress. . . .

The case of *Highland Farms Dairy, Inc.*, v. *Agnew*, 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1936), involved a handler located in Washington, D. C., who was selling packaged milk to stores located in Virginia, said stores in turn reselling the milk to consumers located in Virginia. The State of Virginia did not attempt to assert jurisdiction over the wholesale transactions between the Washington, D. C., handler and the stores in Virginia, but the jurisdiction of the Milk Commission in Virginia was questioned as to the establishment of minimum retail prices between the stores and consumers in Virginia, and the U. S. Supreme Court upheld the authority of the state and held that the state law did not place an undue burden on interstate commerce.

Neither the Eisenberg case nor the Highland Farms case is directly in point with the case at bar since neither case involved the sale of packaged milk by a handler in

one state to a store in another state. However, this occasion did arise later in the case of *State Milk Commission* v. *County Board of Arlington County,* 22 U.S. Law Week 3039 (1953), before the Supreme Court of Virginia, in which the Virginia Commission did assert jurisdiction to establish minimum wholesale prices on packaged milk between a Washington, D. C., handler and stores or consumers located in the State of Virginia. The decision or opinion of the Virginia Supreme Court is not contained in the official reports, but a synopsis of the decision is contained in 22 U.S. Law Week 3039, which reports said case as follows:

> Ruling below (Va. Sup. Ct. App., January 26, 1953): Virginia State Milk Commission has jurisdiction to fix minimum sale price of milk sold and delivered to consumers in adjacent Virginia County by District of Columbia distributors; Commission's order, increasing by one-half cent per quart retail price for such milk, does not burden interstate commerce.
>
> Contention: Commission's order violates Commerce Clause of Federal Constitution and is contrary to federal occupancy of field of Federal Marketing Agreement Act of 1937, as amended.
>
> Appeal filed June 16, 1953, by Malcolm D. Miller, Washington, D. C.
>
> No. 128, County Board of Arlington County, Virginia v. State Milk Commission.

The U. S. Supreme Court affirmed the decision of the Virginia Supreme Court by a per curiam decision in *County Board of Arlington County, Virginia* v. *State Milk Commission,* 346 U.S. 932, 74 S. Ct. 374, 98 L. Ed. 423 (1954). This decision is directly in point with the case at bar and involves the application of a state milk commission law,

which is more far-reaching than the state fair trade law involved in the case at bar.

A very recent decision of this Court was rendered in an appeal from the Supreme Judicial Court of Maine, being the case of *Maine Milk Commission* v. *Cumberland Farms Northern, Inc.*, 205 A.2d 146 (Me. 1964). In that case a handler located in New Hampshire was selling milk to stores located in Maine, the same situation as exists in the case at bar. Cumberland contended that the Maine Milk Commission law violated the interstate commerce clause of the United States Constitution, and the Supreme Judicial Court of Maine, after giving an analysis of the Baldwin, Hood, Dean and Polar cases, held as follows:

> In each of these cases, factors, not present in the instant case, were decisive in striking down the control legislation as unconstitutional.
>
> The legislation in the instant case was enacted for a legitimate purpose. The burden imposed on interstate commerce was incidental only. We hold that it was not violative of the commerce clause of the Federal Constitution.

The case was then appealed to this Court, wherein, on motion to dismiss, this Court did on April 26, 1965, grant the motion and dismissed the appeal for want of a substantial federal question. *Cumberland Farms Northern, Inc.* v. *Maine Milk Commission*, 85 S. Ct. 1333 (1965). The same identical issue is now presented in this case as was presented on motion to dismiss in the Cumberland case and this motion should be granted for the same reasons.

In applying the law set forth above with the facts in the case at bar, Appellee believes that the application of The Milk Products Sales Act would not constitute an undue burden on interstate commerce. By weighing the local impact with the national interest, this is a proper matter

for regulation by the State of Mississippi. The impact and economic consequences are localized and deal with a competitive situation existing in Mississippi and not Tennessee. Since the state law in this case does not discriminate against interstate commerce, the national interest in the free flow of commerce is not substantially affected by the application of the state law. Unless the Appellant is regulated under The Milk Products Sales Act, said law would be useless and totally ineffective, thereby bringing about injury to the welfare of the dairy industry in Mississippi, and would place the outside manufacturer at an economic advantage over the manufacturer in Mississippi. To compel Mississippi handlers to comply with the law while permitting the Appellant with whom they are competing to escape all state regulation would defeat rather than promote the legislative intent as stated in The Milk Products Sales Act.

The Milk Products Sales Act is not discriminatory on its face and imposes identically the same regulations on all who sell milk products in the State of Mississippi, whether they be located within or without the State of Mississippi, nor has the Act been administered in a discriminatory manner. In fact, from 40 to 50 per cent of the milk products sold in Mississippi are sold by manufacturers and distributors located outside of the State of Mississippi.

Any regulation will place some burden on commerce whenever delivery is an essential part of the sale being regulated, whether that commerce be interstate or intrastate. But the question is whether or not the regulation constitutes an "undue" burden on interstate commerce. In other words, does it place a burden on interstate commerce that it does not likewise place on intrastate commerce. The answer to this question should be in the negative and the enforcement of The Milk Products Sales Act in this case

does not constitute an undue burden on interstate commerce.

3. The Milk Products Sales Act of Mississippi Has Not Been Preempted by the Sherman Act, the Clayton Act, the Robinson-Patman Act, or Any Other Federal Legislation.

The second question presented by Appellee on this appeal contained on page 4 of the Jurisdictional Statement is apparently an attempt to assert the doctrine of preemption by virtue of the Sherman Act, the Clayton Act and the Robinson-Patman Act. First, Appellee states that this question cannot be now presented before this Court since the Appellant did not raise this issue in any of the proceedings in the Courts below, this being the first time that Appellant has ever raised this objection or claimed it as a defense. The objection not having been made in time, it should not be considered here. Appellee cannot believe that Appellant is seriously making this contention since the Jurisdictional Statement did not make any further mention of the doctrine of preemption, except to state it as an issue presented by this appeal, and Appellant gave no legal authorities whatsoever to support its position.

Nevertheless, this issue has been clearly put to rest by Congress in the adoption of the McGuire Act, 15 U.S.C.A. 45(a) (1-5), wherein Congress made specific recognition of the continued existence of state fair trade laws as to "any of the Antitrust Acts". In the case of *Hudson Distributors, Inc.* v. *The Upjohn Company*, 377 U.S. 386, 84 S. Ct. 1273, 12 L. Ed. 2d 394 (1964), this Court upheld the application of the Ohio Fair Trade Act to interstate transactions, a portion of this Court's opinion being as follows:

> The price fixing authorized by the Ohio Fair Trade Act and involving goods moving *in interstate commerce* would be, absent approval by Congress, clearly illegal under the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1 et seq. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502. "Fixing minimum prices, like other types of price fixing, is illegal per se." Schwegmann Bros. v. Calvert Distillers Corp. supra, 341 U.S. at 386, 71 S. Ct. at 746. Congress, however, in the McGuire Act has approved state statutes sanctioning resale price maintenance schemes such as those involved here. Whether it is good policy to permit such laws is a matter for Congress to decide. Where the statutory language and the legislative history clearly indicate the purpose of Congress that purpose must be upheld. We therefore affirm the judgments of the Supreme Court of Ohio. (Emphasis added)

As further authority Appellant cites the cases of *Parker* v. *Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1942); *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963); and *Head* v. *Board of Examiners*, 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963).

CONCLUSION

Therefore, the State of Mississippi contends that the only federal conditions placed upon state legislation are as follows:

(1) The state law cannot place an undue burden on interstate commerce.

(2) The state law cannot be in conflict with a federal law.

(3) The state law may be preempted by federal legislation containing the same subject matter.

Since none of the above conditions exist in the case at bar, Appellee respectfully submits that this motion to dismiss should be sustained and that the appeal should be dismissed for the want of a substantial federal question.

Respectfully submitted,

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END